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No. 78-1606

In the Supreme Court of the United States

OCTOBER TERM, 1978

MYRA EMILY STEIN GOUGER AND DONALD THOMAS GOUGER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 41) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1979. A petition for rehearing was denied on March 21, 1979. The petition for a writ of certiorari was filed on April 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether statements by the prosecutor during closing argument constituted an improper comment on petitioners' election not to testify at trial.

2. Whether the district court properly instructed the jury on the elements of the offense.

STATEMENT

After a joint jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of assaulting a Deputy United States Marshal, in violation of 18 U.S.C. 111. Petitioners were each sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 41).

On February 10, 1977, the district court issued a warrant for the arrest of petitioner Myra Gouger after she failed to appear before an officer of the Internal Revenue Service as previously ordered by the court (Pet. 6-8; 1 Tr. 13, 107-103; 3 Tr. 48).[1]

On February 14, 1977, two Deputy United States Marshals contacted petitioner Donald Gouger by telephone and informed him that there was a warrant outstanding against his wife. Mr. Gouger told them that his wife was out to town and that "if you can find her, you can have her" (3 Tr. 51-53). Mrs. Gouger was not located after that telephone call.

On January 3, 1978, Deputy United States Marshal Linda Kalmbach telephoned petitioners' residence, in a further attempt to execute the warrant. Knowing that petitioners sold dinnerware, Kalmbach made an appointment with Mr. Gouger to discuss a purchase later that day (3 Tr. 57-61). Four Deputy United States Marshals,

[1]Mrs. Gouger had previously failed to appear before the district court on at least seven separate occasions pursuant to an Internal Revenue Service summons (1 Tr. 107-109).

together with several local law enforcement officials, then went to petitioners' home to arrest Mrs. Gouger (3 Tr. 51-56, 99, 126-128).

On their arrival, Kalmbach and another female marshal, neither in uniform, approached the residence and rang the doorbell. Mr. Gouger answered the door and invited them into the kitchen (3 Tr. 57, 62-64, 99-101, 128-129). Shortly thereafter, Mrs. Gouger entered the kitchen. Kalmbach identified herself as a Deputy United States Marshal and informed Mrs. Gouger that she was under arrest (3 Tr. 64-65, 101-102). Both petitioners ordered the two marshals out of the house (3 Tr. 65-66, 79). Mr. Gouger then produced a letter that allegedly proved that the civil tax matter that had led to the issuance of the arrest warrant had been resolved. When Kalmbach persisted in the arrest, Mrs. Gouger resisted by striking and kicking her (3 Tr. 67-69, 103-104). At the same time, Mr. Gouger attacked one of the marshals who came to Kalmbach's assistance. Both petitioners were ultimately subdued and arrested (3 Tr. 69-72, 105-114, 131-136).

ARGUMENT

1. Petitioners argue (Pet. 9-14) that the prosecutor's comments to the jury violated their privilege against compelled self-incrimination. The prosecutor made the following statement in response to defense counsel's summation (3 Tr. 232):

> I think one of the most notable things about Mr. Martin's argument is his complete failure to tell us why the Gougers did not, like reasonable, honest citizens should do, respond to that phone call a year before.

* * * * *

> I am talking about Mr. Martin's argument. There was nothing about why the Gougers did not come in like reasonable, honest citizens should have done when they were called about a year earlier and told there was a [sic] arrest warrant out for Mrs. Gouger and please come down to the Federal Building and resolve it. Nothing.

Petitioners contend that the jury could have inferred from these comments that petitioners were under a duty to explain why Mrs. Gouger did not voluntarily surrender when Mr. Gouger received the telephone call advising him that a warrant had been issued for his wife's arrest.

Although a prosecutor may not comment upon a defendant's exercise of his privilege against self-incrimination (*Griffin* v. *California*, 380 U.S. 609 (1965)), the privilege is violated only if the prosecutor's remark would naturally and necessarily be viewed by the jury as a comment on the defendant's failure to testify at trial. *United States* v. *Austin*, 585 F. 2d 1271, 1279 (5th Cir. 1978); *Lussier* v. *Gunter*, 552 F. 2d 385, 388-389 (1st Cir.), cert. denied, 434 U.S. 854 (1977); *United States* v. *Bishop*, 534 F. 2d 214, 220 (10th Cir. 1976); *United States* v. *Williams*, 503 F. 2d 480, 484-485 (8th Cir. 1974). There was no danger that the jury would draw an improper inference in this case.

In his closing argument, petitioners' counsel contended that his clients were law-abiding citizens who had intended only to defend themselves against what they reasonably thought to be unlawful interference with their liberty (3 Tr. 217-218, 220, 225, 228). In answer to this

argument, the prosecutor pointed to the undisputed fact that Mr. Gouger had been advised earlier by telephone that a warrant was outstanding against his wife and that he had taken no action in response to that call. The prosecutor did not refer to petitioners' failure to testify at trial. Rather, his remarks suggested only that inferences could properly be drawn from petitioners' actions and failures to act prior to trial. See *United States* v. *Austin*, *supra*, 585 F. 2d at 1279-1280; *United States* v. *Millet*, 559 F. 2d 253, 258 (5th Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Warren*, 550 F. 2d 219, 227-228 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978); *United States* v. *Fulton*, 549 F. 2d 1325, 1327-1328 (9th Cir. 1977).[2]

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[2] In *Lockett* v. *Ohio*, 438 U.S. 586, 594-595 (1978), this Court held that, in the circumstances of that case, a reference to the fact that the government's evidence is "uncontradicted" did not constitute an infringement of the privilege against compulsory self-incrimination, since the comments "add[ed] nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand." The challenged remarks in this case were less objectionable than those in *Lockett*.

Even assuming that the comments here were improper, the error was harmless. The trial judge instructed the jury that the law did not compel petitioners to testify and that the jury was not to draw an adverse inference because they did not do so (3 Tr. 248). This was sufficient to cure any prejudice that could have resulted from the prosecutor's remarks. See *Lakeside* v. *Oregon*, 435 U.S. 333, 339 (1978); *Lussier* v. *Gunter*, *supra*, 552 F. 2d at 389; *United States* v. *Warren*, *supra*, 550 F. 2d at 227-228; *United States* v. *Fulton*, *supra*, 549 F. 2d at 1328.

2. Petitioners contend (Pet. 15-37) that the district court improperly instructed the jury on the elements of 18 U.S.C. 111. Specifically, they argue that the court should have instructed the jury that if petitioners "either believed or had a reasonable doubt that the [marshals] were not engaged in the performance of their official duties" they should be acquitted of the offense charged (Pet. 15). However, petitioners neither requested such an instruction nor objected to the court's failure to give it. They are therefore precluded from assigning the omission as error. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977); *United States* v. *Jackson*, 569 F. 2d 1003, 1010 (7th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Jansen*, 475 F. 2d 312, 318 (7th Cir.), cert. denied, 414 U.S. 826 (1973).[3] But even if the instruction had been requested, petitioners were not entitled to it, for their receipt of a letter from the Internal Revenue Service indicating that the underlying tax action had been resolved gave them no right forcibly to resist the execution of the arrest warrant.

The purpose of the federal assault statute is to protect the safety of law enforcement officers, not simply to aid the federal law enforcement effort. See *United States* v. *Feola*, 420 U.S. 671, 684 (1974). Accordingly, a person has no right to resist the execution of a warrant even though the warrant may subsequently be held to have been invalid. *United States* v. *Martinez*, 465 F. 2d 79, 82 (2d Cir. 1972); *United States* v. *Ferrone*, 438 F. 2d 381,

[3]The court correctly charged the jury that knowledge of the identity or official character of the person assaulted is not an essential element of the offense but that in order to convict petitioners it had to find that they willfully assaulted or impeded the marshals while the marshals were engaged in the performance of their official duties (3 Tr. 251-253).

389-390 (3d Cir.), cert. denied, 402 U.S. 1008 (1971). The rationale for this doctrine was explained in *Ferrone* (438 F. 2d at 390):

> A public officer supported by written process has a right to expect that citizens will respond peaceably, that neither his life nor those of other parties will be endangered, and that any dispute will be resolved through legal means.

In this case, it is undisputed that petitioners knew that the persons they assaulted were Deputy United States Marshals and that the marshals possessed a warrant to arrest Mrs. Gouger (3 Tr. 51-53, 64-65, 101-102, 107, 131-132, 147). The letter petitioners received from the IRS represented, at most, grounds to challenge the warrant in court, not to assault the deputy marshal who served it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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